20190057
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JUNE 21, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

BRANDON CARLSON,

Appellant,

vs.

STATE OF NORTH DAKOTA,

Appellee.

Supreme Court No. 20190057

District Court No. 18-2017-CV-02489

FILED AS AN APPEAL FROM THE ORDERS DENYING POST-CONVICTION RELIEF DATED AUGUST 23, 2018, AND DECEMBER 14, 2018.

THE HONORABLE DONALD HAGER, PRESIDING, NORTHEAST CENTRAL JUDICIAL DISTRICT.

The State of North Dakota requests oral argument in this matter. In the event Carlson requests oral argument, the State would like the opportunity to respond to any new claims raised by Carlson at the hearing.

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES

(1) Whether Appellant, Brandon Carlson, is entitled to an amended, altered, or relieved judgment from the district court's order denying Post-Conviction Relief.

(2) Whether Appellant, Brandon Carlson, is entitled to Post-Conviction Relief for Ineffective Assistance of Counsel under Strickland v. Washington, 466 U.S. 668 (1984).

STATEMENT OF THE CASE

[¶1] Appellant, Brandon Carlson, was found guilty by a jury of his peers in Grand Forks County District Court for two counts of Gross Sexual Imposition on August 27, 2015. Case No. 18-2015-CR-219 (Index #117-118). Carlson appealed his conviction, arguing the district court abused its discretion in allowing the State to amend its information the day before trial. State v. Carlson, 2016 ND 130, ¶ 6, 881 N.W.2d 649. The district court did not agree, and the North Dakota Supreme Court unanimously affirmed the conviction. Id. at ¶ 16. On September 25, 2017, Carlson applied for post-conviction relief for ineffective assistance of counsel. Carlson's court-appointed attorney, Mark Beauchene, withdrew as counsel on March 5, 2018, because he was unable to find a basis in law or fact to seek relief. Appellee's App. 1.

[¶2] After Carlson was appointed his second post-conviction counsel, Ulysses Jones, Carlson submitted a brief in support of his petition arguing he received ineffective assistance of counsel at trial. Appellee's App. 2. A hearing on the matter was conducted where both Carlson and his trial counsel, Rhiannon Gorham, testified. Appellee's App. 4. The district court subsequently denied Carlson's petition. Appellant's App. pp. A10-22. The district court held Carlson failed to establish either Strickland prongs required to grant post-conviction relief for ineffective assistance of counsel. Id. at 11. Carlson then moved for a new trial under N.D.R.Civ.P. 59(B)(6) arguing again that his trial counsel was ineffective. Appellant's App. pp. A23-26. Carlson did not ask for a hearing on this motion. Id. The State responded to Carlson's motion and asked the district court to deny the request. Appellee's App 5. The district court denied Carlson's motion for a new trial finding that the motion acted as a second post-conviction relief application which is barred under *res*

judicata. Appellant's App. pp. A27-37. The district court decided that Carlson failed to raise a genuine issue of material fact to preclude summary judgment and dismissal of claims. Id. at p. A36. Carlson has appealed the motion's denial to the North Dakota Supreme Court.

STATEMENT OF THE FACTS

[¶3] Carlson was charged with two count of Gross Sexual Imposition on February 2, 2015 in case number 18-2015-CR-00219. During his jury trial, held August 24, 2015 – August 27, 2015, Carlson was represented by Rhiannon Gorham. The jury found Carlson guilty on both counts, and Carlson subsequently appealed his conviction. Carlson, 2016 ND 130, ¶ 1, 881 N.W.2d 649. In his direct appeal, Carlson argued "the district court abused its discretion in allowing the State to amend its information regarding T.P. the day before trial." Id. at, ¶ 6. Additionally, he argued that the district court erred in admitting text message reports into evidence Id. at ¶ 8. The North Dakota Supreme Court unanimously affirmed the conviction holding (1) the district court correctly issued a curative instruction rather than declaring a mistrial and (2) even if admitting the text messages were erroneous, the error was harmless. Id. at ¶¶ 15-16.

[¶4] The appeal at issue in this case does not address the facts of the base offense of Gross Sexual Imposition. Rather, this appeal considers solely the effectiveness of trial counsel.

[¶5] After this Court affirmed Carlson's conviction, Carlson, acting pro se, filed a post-conviction relief application with the district court on September 25, 2017. Appellant's App. A4-7. At this point, he was appointed Attorney Mark Beauchene as his post-conviction counsel.

[¶6] On March 5, 2018, after speaking with Carlson on multiple occasions, reviewing the case file, and speaking with trial counsel, Attorney Beauchene sought the district court's permission to withdraw from counsel as he was "unable to find a basis in law or fact for advancing the grounds for relief set out by [Carlson] that is not frivolous in this matter." Appellee's App. 1, ¶ 4. Additionally, Attorney Beauchene noted that Carlson's trial and appellate counsel "had done an exemplary job in representing his interests." Id.

[¶7] When the district court permitted Attorney Beauchene to withdraw, Ulysses Jones was the next attorney appointed as Carlson's counsel. Attorney Jones filed a brief in support of the petition for post-conviction relief arguing that Carlson's trial counsel was ineffective because she "(1) failed to object to special instruction (sic) which allowed hearsay and unsubstantiated evidence to be admitted; (2) did not introduce medical records which would have shown that Carlson was incapable of doing the things he was alleged to have done; (3) failed to insure (sic) that the prosecution disclosed evidence that was favorable to him; (4) failed to object to the jury instructions so as to allow the jury to deliberate as to the lesser and included offense as to sexual contact; (5) failed to interview or depose the two alleged victims in this case; (6) failed to interview or depose Officer [Conley], one of the investigating officers about his work at the crime scene." Appellee's App. 2, ¶9. A hearing on Carlson's petition for post-conviction relief was held where both Carlson and his trial counsel, Attorney Gorham, testified.

[¶8] At Carlson's post-conviction relief hearing, Carlson testified that he met with his trial counsel more than three times Id. at p. 7, line 16. However, trial counsel testified that Carlson underestimated the amount of times they met. Id. at p. 41, lines 9-15. At the hearing, Carlson testified that he had more than one phone conversation with trial counsel.

Id. at p. 7, line 23. During their conversations, Carlson and trial counsel discussed defense strategies and reviewed the victims' statements. Id. at p. 8, line 7-8; Id. at p. 9, lines 9-12.

[¶9] In his petition, Carlson alleged that his trial counsel failed to object to hearsay and allowed "unsubstantiated evidence to be admitted**."** Appellant's App. A5. However, upon questioning at the hearing, Carlson could not clarify where Attorney Gorham should have objected. Appellee's App. 4, p. 33, lines 10-25.

[¶10] Carlson also testified at his hearing that he suffered an injury to his shoulders that would have made the commission of the offenses physically and medically impossible, but his attorney failed to introduce exculpatory medical records at trial Id. at pp. 14, 22. At the hearing, Carlson failed to produce any evidence of medical records or how they would have been helpful for his case**.** Id. at pp. 35-36. Trial counsel testified that she reviewed "several hundred pages" or medical records and there "didn't appear to be a legitimate claim to make regarding the impossibility of the physical acts that were alleged in the Information." Id. at p. 41, lines 20-24.

[¶11] Carlson testified at the hearing that certain audio files present at trial were altered or deleted. Id. at p. 25, lines 17-23. The State agrees that portions of the audio statement were, in fact, redacted at trial pursuant to Defense's specific demands that certain portions of audio be redacted. 18-2015-CR-219 Tr., p. 68, lines 18-25; Appellee's App. 1-4.

[¶12] Carlson testified at the hearing that his trial counsel failed to depose witnesses. Appellee's App. 4, p. 27, lines 13-20. Trial counsel testified this was a calculated trial strategy as deposing witness would have caused her to "show her hand" before trial. Id. at pp. 22, 53.

[¶13] Carlson testified that his trial attorney failed to object to the jury instructions and should have pursued a lesser included offense. Id. at pp. 27-29. Trial counsel testified that this was another strategic measure as the Defense had an "all or nothing" trial strategy which precluded pursuing lesser included offenses. Id. at p. 46, lines 5-6. Carlson was offered a lesser included offense in a plea offer, but chose to not accept that offer in lieu of proceeding to trial on the counts as charged. Id. at lines 2-14. Trial counsel testified Carlson "was not interested in that lesser charge." Id. at p. 51, lines 14-15. As a matter of strategy, the defense did not pursue lesser included offense to avoid a compromise verdict. Id. at p. 52, lines 18.

[¶14] During Carlson's hearing on his petition alleging ineffective assistance of counsel, Carlson testified, "From what I saw in the courtroom, I thought that she did an excellent job to begin with. At the end of everything, it's just when push came to shove, it just - - chips fell a little on the wrong side that day." Id. at p. 29, lines 6-9. On cross-examination, Carlson admitted that he thinks his trial counsel is "an excellent lawyer." Id. at p. 29, line 22.

[¶15] The district court denied post-conviction relief in a thirteen-page memorandum and order**.** Appellant's App. pp. A10-A22. In the order, the district court recognized the strength of the State's case and cited to the overwhelming evidence against Carlson that was presented at trial. Appellant's App. pp. A17-A18. In Paragraph 24 of the order, the district court highlighted Carlson's numerous admissions including "Carlson admitted to Detective Conley that he took the hand of the victim in Count II and placed it on his penis. Id. at ¶ 24. He admitted he sent a text later to the victim in Count I and told her she didn't

have to get a pregnancy test because 'he didn't get any swimmers off.' Id. He admitted he sent a text to the victim in Count I stating he only used his hand." Id.

[¶16] When analyzing Carlson's petition and claims, the district court cited to this Court's Lindsey decision holding that under high bar set by Strickland, an ineffective assistance of counsel claim must be handled with 'scrupulous care' and as it too easy for petitioners to "second-guess counsel's assistance after conviction or adverse sentence." Lindsey v. State, 2014 ND 174, ¶ 19, 852 N.W.2d 383; Appellant's App. p. A19, ¶27. Under this high standard, the district court ultimately concluded that Carlson had failed to establish either of the Strickland prongs. Appellant's App. pp. A21-22, ¶¶ 38-42.

[¶17] After the district court denied the petition for post-conviction relief, Carlson, through counsel, moved for a new trial based on Rule 59 of the North Dakota Rules of Civil Procedure. Appellant's App. pp. A23-26. Specifically, Carlson based his argument on N.D. R. Civ. P. 59(b)(6) which provides: "The Court may, on motion of an aggrieved party, vacate the former verdict or decision and grant a new trial on any of the following ground materially affecting the substantial rights of the party; (6) insufficient evidence to justify the verdict or other decision, or that the verdict is against the law." N.D. R. Civ. P. 59(b)(6)

[¶18] Carlson's new motion discusses what he referred to as 'Findings 7 and 8." Appellant's App. p. A24, ¶ 11. The district court's section for findings of fact is found in Paragraphs 20-27. Appellant's App. pp. A15-19, ¶¶ 20-27. One could logically assume that "Findings 7 and 8" refer to Paragraphs 36-37 which read,

> Carlson failed to prove his counsel's legal representation fell below an objective standard of reasonableness. Attorney Gorham maintained acceptable communication with Carlson, reviewing file materials and discussing trial strategy, and allowing his participation in decision making.

> She vigorously represented Carlson both pretrial and during trial, objecting numerous times during trial, performing aggressive cross-examination of the State's witnesses, filing and arguing a Rule 29 motion for acquittal post-trial, and appealing the matter to the North Dakota Supreme Court.
>
> In the alternative, Carlson failed to show he was prejudiced by counsel's alleged deficient performance. Both victims testified, which would have been sufficient evidence to convict him.

Appellant's App. p. A21, ¶¶ 36-37. In his motion for a new trial, Carlson argued that his trial counsel was ineffective for failing to depose witnesses and failing to call the victims to testify at the preliminary hearing to "tie them down" to a statement under oath, rather than rely on discovery. Appellant's App. p. A25, ¶ 15. Carlson did not ask for a hearing on this motion. Id. at ¶ 20. The State responded to Carlson's motion and asked the district court to deny the request. Appellee's App. 5.

[¶19] On December 14, 2018, the district court denied Carlson's motion for a new trial in a ten-page order. Appellant's App. pp. A27-37. On Paragraph 22, the district court held that Carlson was "basically using his Motion and N.D. R. Civ. P. 59(6) for a second post-conviction relief application since he contends there was insufficient evidence to support the Court's conclusions he received effective assistance of counsel[.]" Id. at A33, ¶ 22. The district court concluded that "Carlson's Motion and post-conviction requests are barred by *res judicata*. Id. at A36, ¶37. Alternatively, the district court held Carlson had failed to raise a genuine issue of material fact to preclude summary judgment and dismissal of his claims. Id. at ¶ 38.

STANDARD OF REVIEW

[¶20] The Uniform Post-Conviction Procedure Act, N.D.C.C., Chapter 29-32.1, provides the mechanism for criminal relief after conviction. N.D. Cent. Code Ann. § 29-32.1-01. Broadwell v. State gives us the standard of review for such appeals:

> Post-conviction proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. The petitioner has the burden of establishing grounds for post-conviction relief. A trial court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). A finding is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made. Questions of law are fully reviewable on appeal of a post-conviction proceeding.

2014 ND 6, ¶ 5, 841 N.W.2d 750

ARGUMENT

I. The district court properly denied Carlson's Motion for New Trial.

[¶21] This matter, for all intents and purposes, is an appeal of a post-conviction relief action. While the most recent motion before the district court was entitled "Motion for New Trial," citing Rule 59 of the North Dakota Rules of Civil Procedure, ineffective assistance of counsel is a post-conviction relief issue, and N.D.C.C., Chapter 29-32.1 applies in the present case. N.D. Cent. Code Ann. § 29-32.1-01. Therefore, Carlson's appeal should be reviewed as a motion to reconsider because the motion asks the Court to change the district court's order based on alleged insufficient evidence cited in the order denying post-conviction relief for ineffective assistance of counsel. See Eagleman v. State, 2016 ND 54, ¶ 18, 877 N.W.2d 1 ("We are not bound by a party's label, and may look to the substance of the motion to determine its proper classification. Improper labels are not binding on appeal.")

[¶22] Motions to reconsider are treated as either a motion to alter or amend the judgment under N.D. R. Civ. P. 59(j), or a motion for relief from a judgment or order under N.D. R. Civ. P. 60(b). Tuhy v. Tuhy, 2018 ND 53, ¶ 20, 907 N.W.2d 351. According to Rule 60(b), "[o]n motion and just terms, the court may relieve a party or its legal

representative from a final judgment, order, or proceeding**."** N.D. R. Civ. P. 60(b). Motions made pursuant to Rules 59(j) and 60(b) should "not to be used as a substitute for appeal" or "to relieve a party from free, calculated, and deliberate choices" made. Id.; N.D. R. Civ. P. 59(j); Hildebrand v. Stolz, 2016 ND 225, ¶ 16, 888 N.W.2d 197.

[¶23] Motions to amend or for relief from the judgment are within the sound discretion of the district court. MayPort Farmers Co-Op v. St. Hilaire Seed Co., Inc., 2012 ND 257, ¶ 8, 825 N.W.2d 883. Under this standard, Carlson was required to demonstrate the district court acted "arbitrarily, unconscionably, unreasonably," or misinterpreted or misapplied the law. Weigel v. Weigel, 2015 ND 270, ¶ 26, 871 N.W.2d 810. "[R]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." Wright & Miller. 11 Fed. Prac. & Proc. Civ.2d § 2810.1 (3rd ed.).

[¶24] As a result, in seeking reconsideration, 'something more' or 'extraordinary' which justifies relief must be present. See Overboe v. Odegaard, 496 N.W.2d 574, 579 (N.D. 1993). This requirement exists because a "motion to amend findings of fact, or to amend a judgment, may not be used to re-litigate factual questions and present evidence which was available to be presented" at the outset to the district court. Heller v. Heller, 367 N.W.2d 179, 183 (N.D. 1985).

[¶25] In Carlson's Motion for Reconsideration (entitled "Motion for a New Trial,") Carlson failed to reveal any information which would warrant amended findings of fact or judgment by failing to elucidate how the district court acted arbitrarily, unconscionably, unreasonably, or how the district court misinterpreted or misapplied the law in its order denying post-conviction relief for ineffective assistance of counsel. Rather, Carlson provided conclusory statements there was "insufficient evidence to support [the district

court's findings."] and he re-litigated arguments made in his first motion for post-conviction relief. Appellant's App. p. A24, ¶ 10; Appellant's App. pp. A4-7.

[¶26] Carlson argues that the district court did not have sufficient evidence to support what he denoted "Findings 7 and 8" which presumably referred to Paragraph 36-37 of the August 24, 2018 order. Appellant's App. p. A24, ¶ 10. Carlson further states that "taken as a whole, there is not enough evidence to support the [findings] and [conclusion] that trial court counsel in the underlying criminal matter for the Petitioner provided effective assistance." Id. at ¶ 11. These are conclusory statements with no facts or evidence to support why the district court should have amended or give relief to the judgment. Carlson then re-litigates why he believes his trial counsel failed to meet the reasonableness standard for ineffective assistance of counsel by providing the same arguments he presented in his Petition for Post-Conviction Relief. Id. at pp. A25-26, ¶¶ 14-18. Motions to Reconsider are not substitutes for an appeal nor may an Appellant re-litigate factual questions or present evidence that was already available to the district court at the outset. See Hildebrand, 2016 ND 225, ¶ 16, 888 N.W.2d 197; see also Heller, 367 N.W.2d 179, 183 (N.D. 1985). As the issue regarding interviewing witnesses prior to trial was already litigated and decided upon, the argument should bear no weight on an appeal for a motion to reconsider. Carlson failed to show how the district court acted arbitrarily, unconscionably, or unreasonably or misinterpreted or misapplied the law to warrant amending or giving relief to the judgment. Therefore, the court properly denied Carlson's motion.

A. In the alternative, if the Court finds that the district court erred, any error made by the district court was harmless

[¶27] In the event the Court deems that the district court erred by denying Carlson's motion to reconsider, it must then be determined whether Carlson was prejudiced by the error. The Court's standard for harmless error states:

> Unless justice requires otherwise, no error in admitting or excluding evidence, or any other error by the court or a party, is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

N. D. R. Civ. P. 61. This Court defines harmless error as "an error that is not prejudicial." Gonzalez v. State, 2019 ND 47, ¶ 14, 923 N.W.2d 143.

[¶28] This Court may only reverse a district court's denial of a motion to reconsider if the court abuses its discretion by acting in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination. Flaten v. Couture, 2018 ND 136, ¶ 27, 912 N.W.2d 330, reh'g denied (July 11, 2018).

[¶29] Upon reviewing Carlson's numerous post-conviction appeals and motions, both the district court and the North Dakota Supreme Court found there was evidence supporting Carlson's guilt in the underlying criminal matter. Carlson, 2016 ND 130, ¶¶ 8-10, 881 N.W.2d 649; Appellant's App. pp. A10-22. Upon review, both Courts relied upon the evidence presented at trial such as the victims' testimonies. See Carlson, 2016 ND 130, ¶ 15, 881 N.W.2d 649, ("Any prejudicial effect stemming from admission of the reports was nominal. […] T.P testified she awoke to Carlson having sex with her and S.S. testified she awoke to Carlson forcing her hand on his penis. […] Without any resulting prejudice, the district court's admission of the reports, even if erroneous, was harmless error.") See also Appellant's App. p. A21, ¶ 37, ("Carlson failed to show he was prejudiced by counsel's

deficient performance. Both victims testified, which would have been sufficient evidence to convict him.") The same facts and evidence presented at trial, and reviewed by this Court, still stand true today. See Carlson, 2016 130, ¶¶ 15-16, 881 N.W.2d 649. Any prejudicial effect Carlson suffered from trial counsel's actions was nominal. Without any resulting prejudice, the district court's denial of a motion to reconsider, even if erroneous, was harmless error.

II. The district court properly denied Carlson's Petition For Post-Conviction Relief

[¶30] The Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, and Article I, § 12 of the North Dakota Constitution guarantee a criminal defendant effective assistance of counsel. U.S. Const. amend VI; N.D. Const. art. I, § 12. In order to prevail on a post-conviction relief application based on ineffective assistance of counsel, the petitioner must (1) "show that counsel's representation fell below an objective standard of reasonableness" and (2) "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984).

> Surmounting Strickland's high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial or in pretrial proceedings, and so the Strickland standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under de novo review, the standard for judging counsel's representation is a most deferential one.... It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence.

Booth v. State, 2017 ND 97, ¶ 7, 893 N.W.2d 186.

[¶31] A "defendant must first overcome the 'strong presumption' that trial counsel's representation fell within the wide range of reasonable professional assistance, and courts must consciously attempt to limit the distorting effect of hindsight." Brewer v. State, 2019 ND 69, ¶ 6, 924 N.W.2d 87. Strickland's objective standard of reasonableness test will take prevailing professional norms into account. Heckelsmiller v. State, 2004 ND 191, ¶ 3, 687 N.W.2d 454. As this Court has noted, there are many actions that fall under reasonable professional assistance. Id. at ¶¶ 8-9. Simply using an "unsuccessful trial strategy does not make defense counsel's assistance defective, and [this Court] will not second-guess counsel's defense strategy through the distorting effects of hindsight." Garcia v. State, 2004 ND 81, ¶ 8, 678 N.W.2d 568.

[¶32] In this case, Carlson failed to establish both *Strickland* prongs by failing to show his trial counsel's representation fell below an objective standard or reasonableness and by failing to show there was prejudice as a result of trial counsel's actions. In the district court's order on Carlson's motion to reconsider, the district court found there was overwhelming evidence that Carlson received objectively reasonable counsel at trial nor was he prejudiced by his attorney's actions.

[¶33] When determining whether Carlson's trial counsel acted in an objectively reasonable manner, the district court relied heavily on the testimony offered by Carlson and his trial counsel at the evidentiary hearing on August 6, 2018. Appellee's App. 4**.** During the hearing, both Carlson and Attorney Gorham testified regarding how often they reviewed the case, discovery, and evidence and discussed trial strategies. Id. Regarding Carlson's contention that his trial counsel failed to interview the victims prior to trial, Attorney Gorham testified at the motion hearing that it was a deliberate, calculated choice

to not interview the State's witnesses as to not incidentally reveal their defense strategy. Id. at pp. 22, 53. Carlson's trial counsel also testified that she discussed trial strategy with Carlson allowing him to participate in the decision-making process. Id. at p. 8, line 7-8; Id. at p. 9, lines 9-12. In the end, Carlson admitted he thinks his trial counsel is "an excellent lawyer" and that he brought the motion understanding "hindsight is 20/20." Id. at 29, line 22; Appellant's App. p. A25, ¶16. Therefore, under the high standard set by Strickland, Carlson failed to overcome the strong presumption that his counsel's representation fell within the wide range of reasonable professional assistance. Thus, the district court properly held that trial counsel acted within the objective standard of reasonableness.

[¶34] Not only must Carlson overcome Strickland's first prong, but he also must demonstrate that there was prejudice as a result of his attorney's errors. "Even where the court finds that counsel's representation fell below an objective standard of reasonableness, prejudice is not normally assumed." Broadwell v. State, 2014 ND 6, ¶ 7, 841 N.W.2d 750; see also Osier v. State, 2014 ND 41, ¶ 11, 843 N.W.2d 277 ("Courts need not address both prongs of the Strickland test, and if a court can resolve the case by addressing only one prong it is encouraged to do so.") To demonstrate prejudice, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and the defendant must specify how and where trial counsel was incompetent and the probable different result." Brewer v. State, 2019 ND 69, ¶ 9, 924 N.W.2d 87 "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.; Strickland, 466 U.S. at 694.

> [U]nless counsel's errors are so blatantly and obviously prejudicial that they would in all cases, regardless of the other evidence presented, create a reasonable probability of a different result, the prejudicial effect of

> counsel's errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial.

Middleton v. State, 2014 ND 144, ¶ 13, 849 N.W.2d 196.

[¶35] In Carlson's post-conviction relief evidentiary hearing regarding whether he suffered prejudice resulting from his trial counsel's actions, Carlson stated, "From what I saw in the courtroom, I thought that [trial counsel] did an excellent job to begin with. At the end of everything, it's just when push came to shove, it just - - chips fell a little on the wrong side that day." Appellee's App. 4, p. 29, lines 6-9.

[¶36] In Carlson's motion to reconsider, he contends that he was prejudiced by his attorney's actions because he would have considered entering into the State's offered plea agreement had he known how the State's witnesses would have testified before. Appellant's App. p. A26, ¶ 18. Specifically, Carlson argues "if [Carlson] knew then regarding what happened at trial as he knows now, [Carlson's] position on a plea agreement conceivably would have been altered." Id. at ¶ 19. However, through discovery, Carlson was made aware of the evidence that was against him prior to trial and at the time the plea agreement was available**.** See Appellee's App. 4, p. 9, line 13-16. (Testifying at his motion hearing that he and trial counsel reviewed the statements made by the victims prior to trial.) Based on Carlson's testimony, even though his trial counsel did not interview the victims prior to trial, Carlson was aware of the charges and allegations against him while he was offered a plea agreement. As his trial counsel testified at the motion hearing, Carlson was not interested in pursuing lesser charges. Id. at p. 51, lines 14-15. Therefore, Carlson failed to establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different by entering into a plea agreement. Thus, the

district court properly held Carlson did not suffer prejudice as a result of trial counsel's actions.

CONCLUSION

[¶37] When Carlson submitted his Motion for Reconsideration (entitled "Motion for a New Trial") to the district court, he did so as a substitute for appeal which is strictly prohibited under case law. Carlson has failed to show how the district court abused its discretion and failed to show his trial counsel's ineffectiveness. Carlson was convicted on two counts of Gross Sexual Imposition in 2015, and this is now his second appeal to the Court since that conviction. The facts of his underlying criminal matter remain the same today as they were during Carlson's trial and Carlson's first appeal to the Court. Reversing the district court's decision would have no impact on Carlson's sentence. For all the aforementioned reasons, the North Dakota Supreme Court should affirm the district court's order denying Carlson's motion for reconsideration and petition for post-conviction relief.

Respectfully submitted this 21st day of June, 2019.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

BRANDON CARLSON, Supreme Court No. 20190057

Appellant,

vs. District Court No. 18-2017-CV-02489

STATE OF NORTH DAKOTA,

Appellee.

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STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

21st The undersigned, being of legal age, being first duly sworn deposes and says that on the day of June, 2019, she served true copies of the following documents:

Appellee's Brief
Appellee's Appendix

electronically through the Court Electronic Filing System to:

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States Attorney's Office

Subscribed and sworn to before me this 21st day of June, 2019.

Notary Public

mlj

JILL N. PURPUR-FERTIG
Notary Public
State of North Dakota
My Commission Expires Dec. 3, 2021